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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

STATE OF NEW YORK,
Petitioner,

- v -

ALFONSO OWENS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE APPELLATE DIVISION, FIRST DEPARTMENT

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QUESTION PRESENTED

When the evidence on appeal is found insufficient to prove an aggravating element of an offense, and the conviction may not simply be reduced to one for a lesser included offense solely because of an unrelated trial error, does the Double Jeopardy Clause of the United States Constitution bar retrial of the defendant on the lesser included offense?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner the State of New York respectfully requests this Court to issue a writ of certiorari to review the final decision of the New York State Supreme Court, Appellate Division, First Department, entered on May 21, 1996.

OPINION BELOW

The opinion of the New York State Appellate Division, First Department, dated May 21, 1996, concluding that the Double Jeopardy Clause of the United States Constitution prohibited Owens's criminal prosecution is reported at ___ A.D.2d ___, 642 N.Y.S.2d 874 (N.Y.App.Div. 1996).

JURISDICTION

The Order of the New York State Court of Appeals denying discretionary review of the order of the New York State Supreme Court, Appellate Division, First Department was entered on August 1, 1996. This Court's jurisdiction is being invoked under 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution, provides, in pertinent part:

> ... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ....

Amendment XIV, Section 1, of the United States Constitution, provides, in pertinent part:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law ....

STATEMENT OF THE CASE

A. The Events Leading to the Conviction

Respondent Alfonso Owens was charged with first degree robbery after robbing a Manhattan bar. In November 1991, Owens, represented by counsel, proceeded to a jury trial presided over by Justice Felicia Shea, and was convicted as charged.

B. Owens's Direct Appeal

On direct appeal to the Appellate Division, defendant argued successfully that the proof of the aggravating element for first degree robbery -- that he had displayed what appeared to be a firearm during the robbery -- had been legally insufficient. While agreeing with Owens's contention, the Appellate Division specifically stated that, since third degree robbery *had* been clearly proven beyond a reasonable doubt, it would simply have modified the conviction to that of a lesser included offense but for a trial error -- the prosecutor had violated the trial court's ruling regarding the scope of cross-examination about defendant's criminal history. Since Owens was entitled to a new, error-free trial on the lesser-included offense, the court remanded to permit the prosecutor to obtain an indictment for third degree robbery. *People v. Owens,* 203 A.D.2d 106, 107, 610 N.Y.S.2d 485 (N.Y. App. Div. 1996).

C. Dismissal of the New Indictment

The State of New York subsequently obtained a new indictment charging Owens with two counts of third degree robbery. Owens then moved successfully before the trial court to dismiss the newly-obtained indictment on double jeopardy grounds. The Appellate Division upheld the lower court's holding that re-presentation of the lesser included offense was barred on that ground. The court reasoned that its

"insufficiency finding on the first-degree robbery charge was tantamount to an acquittal (*Burks v. United States*, 437 U.S. 1, 16) and the lesser included third-degree robbery charge was the 'same offense' as first-degree robbery for double jeopardy purposes, thus barring a re-trial (*United States v. Dixon*, ___ U.S. ___, 113 S.Ct. 2849, 2856, citing *Brown v. Ohio*, 432 U.S. 161)." *People v. Owens*, ___ A.D.2d at ___, 642 N.Y.S.2d at 874.

REASONS FOR GRANTING THE WRIT

The writ should be granted because a fundamental split exists among several states, and within New York itself, as to the controlling issue: whether double jeopardy principles permit retrial of a defendant whose conviction has been reversed for insufficiency of an aggravating element of the crime, if a lesser included crime had been proved beyond a reasonable doubt. While the New York State Appellate Division concluded in this case that defendant cannot be re-tried, several states, and in fact New York's highest court, have concluded that re-trial under these circumstances would not violate the double jeopardy clause. Thus, under the various interpretations of the double jeopardy clause existent in the states, Owens can evade punishment for a crime in New York that the State proved he committed, while in other states he could be re-tried for that offense.

The issue of whether an appellate reversal for insufficiency of the evidence of an aggravating element bars

retrial for lesser included offenses that *were* sufficiently proven at a first trial is one this Court has never explicitly addressed, but is of great significance. Under settled double jeopardy principles, the general rule is that a reversal on appeal is *not* the equivalent of a jury acquittal for double jeopardy purposes, and that a reversal thus permits the defendant's retrial. *See Lockhart v. Nelson*, 488 U.S. 33, 38 (1988). But that rule does not apply when a reversal is for the legal insufficiency of the evidence of the charged offense and its lesser offenses at the first trial.

The theory underlying that exception to the rule is that the government should have one fair chance to present legally sufficient evidence, and that if it fails to do so, double jeopardy bars retrial. For instance, in *Burks v. United States*, 437 U.S. 1 (1978), the government failed to prove the defendant's sanity beyond a reasonable doubt at his first trial, and thus his guilt of any offense. Such an evidentiary insufficiency, of course, precluded the defendant's retrial for any offense. *Id.* at 3-4, 10-11.

The exception, however, should not apply where the evidentiary insufficiency found on appeal extends only to an aggravating element of the crime. In that case, as here, the government *has* proven every element of the lesser included offense beyond a reasonable doubt, so retrial on the lesser charge with respect to *that* offense does not implicate double jeopardy concerns.

That conclusion makes perfect sense. After all, it is well settled in both federal and state courts that, consistent with double jeopardy concerns, appellate courts "may direct the entry of judgment for a lesser included offense when a

conviction for a greater offense is reversed on grounds that affect only the greater offense." *Rutledge v. United States*, ___ U.S. ___, 116 S.Ct. 1241, 1251, 134 L.Ed 2d 419 (1996); *see also State v. Malufau*, 906 P.2d 612, 621, 80 Haw. 126 (Hawaii 1995)(collecting state cases); 3 W. LaFave & J. Israel, *Criminal Procedure* § 24.4, at 91-92 (1984). That approach recognizes that, had the trial court properly charged the jury, the greater offense would never have gone to the jury for the evidence was insufficient as a matter of law to support a conviction for that offense. Therefore, modification of the judgment of conviction by the appellate court to that of a lesser included offense puts the defendant in the same position he would have been in if the trial court had not erred the first place.

If modification is permitted in such a case, then a retrial should be permissible here. The only difference between simple modification of a judgment to that of a lesser included offense, and the instant case, is that a retrial is given to the defendant for a trial error, exposing him at most to the charge that, in a case like *Rutledge*, would be deemed already proved. As noted by one commentator,

> it would seem to follow that if the appellate court has also found some error in the trial [in addition to a determination that insufficient evidence to support a conviction for the greater offense was presented], then it is proper to remand the case for

> retrial on the lesser included offense.

3 W. LaFave & J. Israel, *Criminal Procedure*, § 24.4, at 91-92 (1984) (footnotes omitted). Other federal and state courts have likewise approved procedures that would not, as the New York decision does, insulate one like Owens from prosecution for an offense that there can be no doubt that he committed. *See Beverly v. Jones,* 854 F.2d 412, 416, *reh'g denied*, 861 F.2d 727 (11th Cir. 1988), *cert. denied*, 490 U.S. 1082, 109 S.Ct. 2104, 104 L.Ed.2d 665 (1989); *Dickinson v. Israel,* 482 F.Supp. 1223, 1226 (E.D.Wis. 1980), *aff'd on opinion below*, 644 F.2d 308 (7th Cir. 1981); *State v. Malufau,* 906 P.2d at 622; *State v. Maupin,* 859 S.W.2d 313, 317-18 (Tenn. 1993); *State v. O'Brien,* 857 S.W.2d 212, 221 (Mo.Banc 1993); *Gorham v. Commonwealth,* 426 S.E.2d 493, 496-97, 15 Va.App. 673 (Va.App. 1993); *State v. Garcia,* 837 P.2d 862, 869, 114 N.M. 269 (N.M. 1992); *State v. Alston,* 216 S.E.2d 416, 418-19, 26 N.C.App. 418 (N.C.App.Ct. 1975).

Indeed, New York's own confusion on this issue warrants this Court's assistance. For example, in *People v. Ryan,* 82 N.Y.2d 497, 605 N.Y.S.2d 235, 626 N.E.2d 51 (1993), the New York Court of Appeals held that the evidence presented at trial was insufficient to prove the aggravating element of attempted criminal possession of a controlled substance in the second degree -- that the defendant had known the specific weight of the drugs in his possession. *Id.* at 506-507, 605 N.Y.S.2d at 240-41, 626 N.E.2d at 56-57. The Court of Appeals also held that the trial court had committed reversible error by improperly denying the

defendant's request to represent himself. *Id.* at 507-508, 605 N.Y.S.2d at 241, 626 N.E.2d at 57.

Under those circumstances, however, the Court of Appeals did not, as the Appellate Division's decision would seemingly mandate, reverse the conviction and dismiss the case on double jeopardy grounds. Rather, the remedy fashioned by the Court of Appeals in *Ryan* was to grant the government leave to retry the defendant on the lesser included offense that was proved at trial. Other New York courts have likewise fashioned the exact same remedy found by the Appellate Division to violate the double jeopardy clause in the instant case. *See, e.g., People v. Youngblood,* 210 A.D.2d 948, 621 N.Y.S.2d 988 (N.Y.App.Div. 1994); *People v. Sanchez,* 209 A.D.2d 265, 618 N.Y.S.2d 718 (N.Y.App.Div. 1994); *People v. Robare,* 109 A.D.2d 923, 925, 486 N.Y.S.2d 393 (N.Y. App.Div. 1985).

Unaccountably, Owens's position finds support in cases from Florida, Texas and Alabama. Those jurisdictions have concluded that the state's right to retry a defendant for a lesser included offense hinges on whether the lesser offense was expressly submitted to the jury at the defendant's first trial. *See Ex Parte Roberts,* 662 So.2d 229, 232 (Ala. 1995); *Granger v. State,* 850 S.W.2d 513, 519-520 (Tex. Crim. App. 1993); *Webster v. State,* 549 So.2d 784, 785 (Fla.App.2 Dist. 1989). Of course, that position makes no sense, for if the jury finds the defendant guilty of the aggravated offense, it must by definition have also found the defendant guilty of the lesser crime, whether or not it has said so expressly. *See, e.g., State v. Maupin,* 859 S.W.2d at 316-317. That the confusion exists,

of course, merely underscores the need for this Court to resolve this important and recurring issue once and for all.

* * * * *

The result reached by the Appellate Division here would allow a criminal defendant completely to escape liability for an offense on account of the legal quirk that his trial contained both an evidentiary sufficiency problem that could normally be remedied simply by appellate modification, and an otherwise unforeseen trial error that could normally be remedied by a retrial. Yet, in several other states, the federal constitution has been found to allow a retrial on a lesser charge under such circumstances. Thus, in New York, a defendant stands immunized from prosecution for a serious crime that he undoubtedly committed, while in other states, the prosecution could go forward. For that reason, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 9, 1996

App. 1

PEOPLE OF THE STATE OF NEW YORK,
Appellant,

- v -

ALFONSO OWENS,
Defendant-Respondent.

Cal. No. 93-11524

New York State Supreme Court
Appellate Division
First Department.

May 21 1996

Order, Supreme Court, New York County (Alvin Schlesinger, J.), entered November 16, 1994, dismissing the indictment, unanimously affirmed.

During defendant's first trial, the jury was not charged on any lesser included offense. After his conviction on the sole count of the indictment charging first-degree robbery, defendant appealed to this Court seeking a new trial due to a *Sandoval* error and dismissal of the indictment due to insufficient evidence. After finding there was a *Sandoval* violation and that the evidence was insufficient with respect to the greater charge, but sufficient as to third-degree robbery, this Court reversed the conviction, but granted the People leave to re-present the lesser charge (203 AD2d 106, *lv denied*

84 NY2d 871). Upon his re-indictment for third-degree robbery, defendant moved to dismiss the new indictment on double jeopardy grounds.

The hearing court correctly dismissed the indictment since this Court's insufficiency finding on the first-degree robbery charge was tantamount to an acquittal (*Burks* v *United States*, 437 US 1, 16) and the lesser included third-degree robbery charge was the "same offense" as first-degree robbery for double jeopardy purposes, thus barring a retrial (*United States v Dixon*, 113 S Ct 2849, 2856, *citing Brown v Ohio*, 432 US 161).

The husband and wife owners were present during the robbery of their bar. The original indictment filed by the People pertained solely to the wife. Since the People had sufficient evidence with which to proceed on an indictment against defendant with respect to the robbery of the husband, the court correctly dismissed the first count of the new indictment pertaining to the husband (CPL 40.40[2]).

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

- v -

ALFONSO OWENS
Defendant-Appellant,

Cal. No. 95-223

New York State Supreme Court
Appellate Division
First Department.

April 19, 1994.

Judgment of the Supreme Court, New York County (Felice Shea, J.), rendered December 10, 1991, convicting defendant, after jury trial, of robbery in the first degree, and sentencing him, as a second felony offender, to an indeterminate term of imprisonment of from 6 to 12 years, unanimously reversed, on the law, with leave to re-present the charge of robbery in the third degree to a Grand Jury.

Defendant was convicted of first degree robbery under a single-count indictment. The crime occurred on January 23, 1990 at approximately 2:00 A.M. in the bar owned by complainants. An owner identified defendant from a photograph and at two separate line-ups.

At issue on this appeal is whether the prosecutor's failure to abide by the court's Sandoval ruling requires reversal and whether the record supports the conviction for robbery in the first degree.

The Sandoval ruling restricted inquiry into a 1987 attempted burglary conviction, obtained upon defendant's guilty plea, and the underlying facts thereof. The prosecution, however, went beyond the scope of the ruling by cross-examining defendant about charges which arose as a result of stolen credit cards and marijuana found on his person at the time of his arrest. Defendant's possession of these items was not relevant to any element of the crime to which his conviction relates. It was not asserted that the items were taken in the course of the burglary and, thus, their possession was not part of the underlying facts of that crime. By permitting the prosecutor to inquire into other crimes over defense objection, the court altered its Sandoval ruling to defendant's prejudice.

The purpose of a Sandoval ruling is to provide a defendant with "definitive advance knowledge of the scope of cross-examination as to prior conduct to which he will be subjected" should he testify (*People v Sandoval,* 34 NY2d 371, 375). Having received a determination limiting inquiry, "defendant then had a right to rely on the court's ruling when he took the witness stand and to expect that the court would not permit cross-examination to extend to matters apparently precluded by the ruling" (*People v Aponte,* 168 AD2d 274, 275). By allowing cross- examination into possessory crimes having no relation to the attempted burglary, the court

deprived defendant of his right to make an informed decision about giving testimony (*see, People v Durham*, 154 AD2d 615, 616).

We also find that the evidence is insufficient to sustain conviction for robbery in the first degree. The court precluded the People from examining the complaining witness on the question of whether defendant threatened use of a firearm during the course of the robbery, specifically whether she subjectively perceived that he was armed. Thus, an element of the crime—that defendant employ a firearm or what appears to be a firearm—is not supported by the record, and the verdict cannot be sustained. The evidence is, however, sufficient to sustain a conviction for robbery in the third degree, to which we would reduce the verdict were it not for the Sandoval error.

Concur—Murphy, P. J., Sullivan, Ross, Rubin and Tom, JJ.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

- v -

ALFONSO OWENS
Defendant-Respondent,

In re New York County Indictment No. 94-5064

New York State Court of Appeals
Certificate Denying Leave
August 1, 1996

BEFORE: HON. CARMEN BEAUCHAMP CIPARIK

I, CARMEN BEAUCHAMP CIPARIK, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question

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*Description of Order: Order of the Appellate Division, First Department, entered May 21, 1996, affirming an order of the Supreme Court, New York County, entered November 16, 1994.

of law presented which ought to be reviewed by the Court of Appeals and permission is hereby denied.

Dated at New York, New York
August 1, 1996

/s/ Carmen Beauchamp Ciparik
Associate Judge